88-47

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALTON CAMPBELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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July 1988

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QUESTIONS PRESENTED

1. Following the conclusion of the presentation of evidence in petitioner's criminal trial for vote buying, voting more than once and conspiracy, the district court disqualified a juror on the basis of an anonymous tip that the juror's parents-in-law are Republicans. The question presented is whether a juror may be disqualified solely on the grounds of political affiliation.

2. The district court admitted into evidence the hearsay statements of defendant's alleged coconspirator without sufficient independent evidence of the existence of a conspiracy. The question presented is that left open in *Bourjaily v. United States*, ___ U.S. ___ , 107 S.Ct. 2775 (1987), *i.e.*, whether the court could have relied solely upon the coconspirator's statements to determine that a conspiracy had been established by a preponderance of the evidence.

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OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 845 F.2d 782 (8th Cir. 1988). The district court issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1988. A timely petition for rehearing was denied on June 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes which this case involves are as follows:

"If two or more persons conspire either to commit an offense against the United States, or to

defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371.

"Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner for the Commonwealth of Puerto Rico." 42 U.S.C. § 1973i(c).

"Whoever votes more than once in an election referred to in paragraph (2) shall be fined not

more than $10,000 or imprisoned not more than five years, or both.

The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner for the Commonwealth of Puerto Rico.

As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 1973aa-1 of this title, to the extent two ballots are not cast for an election to the same candidacy or office." 42 U.S.C. § 1973i(e).

STATEMENT OF THE CASE

Petitioner Alton Campbell was a candidate for reelection as county judge of Newton County, Arkansas in the general election held on November 4, 1986. During this election, a United States Senator and Representative and various state officials were to be elected. Charles Clark, a co-defendant, was a candidate for Newton County sheriff.

The complaint alleged that Campbell and Clark approached a number of individuals for the purchase of their votes and that Dennis "Cotton" Holt, a precinct worker for Campbell, purchased absentee ballots from voters on behalf of Campbell. The complaint further

alleged that Campbell bought the votes of two county residents, Pamela Cross and Penny Ann Carter. On April 15, 1987, a grand jury of the Western District Court of Arkansas filed an indictment charging Campbell with fourteen counts of vote buying in violation of 42 U.S.C. § 1973i(c), one count of multiple voting in violation of 42 U.S.C. § 1973i(e), and one count of conspiracy in violation of 42 U.S.C. § 1973i(c) and 18 U.S.C. § 371. Charles Clark was named in eight counts of the indictment, and Dennis Holt was charged in six counts.

The trial was held in June 1987 in Harrison, Arkansas. Following the second day of trial, an FBI agent notified the district attorney that she had received a phone call from an interested citizen of Newton County that one of the jurors, Robin Noell, was the son-in-law of two citizens of Newton County who were close to and had worked for Alton Campbell during the election. The caller also told the district attorney that Noell had received a culvert from Campbell through his father-in-law. The district attorney conveyed this information to the court on the third and final morning of the trial.

After the conclusion of testimony, but prior to the jurors' deliberations, the judge questioned Noell *ex parte* over the objection of Campbell. During questioning, the judge found Noell to be an "honest young man." Noell told the judge that he was aware that his in-laws knew Campbell but that he did not know whether they worked for Campbell. The judge did not question Noell about his alleged procurement of the culvert. Instead, the judge excused Noell *solely* on the basis of the political affiliations of Noell's in-laws:

"He [Noell] I think is an honest young man. I don't believe for a minute that he was doing anything wrong, I think he answered the questions he was asked. But he said yes, he knew that they knew Sheriff—or Judge Campbell, he professes not to know whether they worked for him or not. . . . This citizen also told [the FBI agent] that in fact Mr. Noell, the son-law, the juror, had received through his father-in-law from the county judge a culvert that he used for his personal use. I did not ask Mr. Noell that even though I said I would, because I did not want to embarrass him, so I thought at this point that the facts that I had were such that I was going to excuse the juror anyway, because of the fact that we have two alternates. There is no reason to put him on the spot. If any of that information is correct, even if it's only correct that the Greenhaws are in fact Republicans down in Newton County and Mr. Martin has indicated in chambers that he believes them to be. I know what that means in Newton County from experience so based on that alone, the Court believes there is sufficient evidence to excuse that juror. . . . Let me say that I know from experience having been a lawyer in this area and having tried a number of cases as a judge involving Newton County that they feel very strongly about their politics down there and they also—it's a very small county, very rural county. The Republicans are usually very close to other Republicans, the Democrats are usually very close to other Democrats. They

> feel very strongly about their candidates. So with those facts in mind the Court has excused Mr. Noell." App. B at 15a-16a.[1]

Thus, although the judge referred to other factors in passing, he relied only upon the political affiliation of Noell's in-laws in disqualifying the juror.[2]

During the testimony of Wanda Bough and Jack Bough, hearsay statements of Dennis Holt incriminatory to Alton Campbell were sought by the prosecution and offered into evidence under Rule 801(d)(2)(E) of the Federal Rules of Evidence—the exclusion of coconspirator statements from the definition of hearsay. Both Wanda Bough and Jack Bough testified that Holt told them that he would give Campbell the absentee voter statements and ballots he had bought from them and that Campbell would finish filling out the ballots. Petitioner objected to the admission of these statements on the grounds that there was no independent evidence of a conspiracy between Holt and Campbell and that the hearsay evidence was therefore inadmissible. The district court conditionally admitted the testimony and subsequently determined that the government had shown the existence of a conspiracy by a preponderance of the evidence. The court, however, failed to describe specifically the evidence supporting its conspiracy finding. App. B at 26a-28a, 29a-31a.[3] In fact, there was

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[1] Relevant portions of the trial transcript are contained in Appendix B.

[2] The judge was apparently unwilling to follow fully the logic of his presumption. He did not examine other jurors in order to determine whether they had ties to the Newton County Democratic party.

[3] "The Court has a little more trouble with this testimony.

no evidence of a conspiracy other than the alleged coconspirator's statements themselves. *See* App. B at 20a-31a.

The Court dismissed for insufficient evidence one count of vote buying and the count of voting more than once against Campbell. The jury returned a verdict of not guilty on the conspiracy count and not guilty on eleven of the remaining vote buying counts. It rendered a verdict of guilty on counts 9 and 13 which charged Campbell with buying the votes of Pamela Cross and Penny Ann Carter. Holt and Clark were acquitted on all counts. The court sentenced Campbell to a term of imprisonment of three years, a fine of $2,500 and a special assessment fee of $50 on each count.

Petitioner appealed the district court's judgment to the United States Court of Appeals for the Eighth Circuit. On appeal, petitioner argued that the trial court judge should not have questioned Noell at the close of the trial purely on the basis of the disclosures of an anonymous tipster, and that having done so, the Court should not have excused Noell solely on the ground that his in-laws were Newton County Re-

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. . . The Court believes though that based on the testimony of various individuals about the way ballots were obtained, documents that were signed and who they were brought to, those kinds of things, the Court does find that the Government has met its burden of proving that more likely than not that there was a conspiracy between the individuals and that these statements that Mr. Holt was alleged to have made by one or more of the witnesses were made in furtherance of that conspiracy, so the Court makes—I hope I've made the specific finding required by *United States v. Bell* . . . ." App. B at 27a-28a.

publicans. Petitioner also argued that the Court had not in fact found independent evidence of a conspiracy between Holt and Campbell, and that, in essence, the district court had bootstrapped the hearsay evidence into proof of the conspiracy.

The court of appeals held that the district court properly disqualified juror Noell under Rule 24(c) of the Federal Rules of Criminal Procedure.[4] Although the court of appeals questioned the district court's extraordinary procedure, App. A at 6a, n.3, it credited the trial judge's "experience with the strength of partisan feelings in Newton County." *Id.* at 6a. The court of appeals accepted the district court's attribution of these "partisan feelings" to Noell from the political affiliation of his parents-in-law. *Id.* at 5a. The court of appeals also upheld the district court's admission of the testimony of Dennis Holt. It found that nonhearsay testimony and other evidence was proffered to show that Campbell and Holt, acting individually, and Campbell and Clark, acting together, bought absentee ballots. The court of appeals, however, pointed to no independent evidence linking Holt and Campbell to a vote fraud conspiracy. *Id.* at 11a. Nonetheless, the court of appeals affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided important questions regarding the basis for juror disqualification and

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[4] Rule 24(c) provides:

> "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." Fed. R. Crim. P. 24(c).

the scope of the exclusion of coconspirator statements from the definition of hearsay in a manner inconsistent with the decisions of this Court and other courts of appeals. A juror's qualification has long been held to be a matter of individual competence rather than group affiliation. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946). Yet, the court of appeals has determined that a juror may be disqualified solely on the basis of the presumed bias allegedly flowing from a political affiliation—in this case the membership of the juror's parents-in-law in the same political party as petitioner. As the Third Circuit held in *United States* v. *Salamone*, 800 F.2d 1216 (3d Cir. 1986), such an approach is antithetical to the concept of trial by jury and inherently prejudicial. Indeed, the court of appeals' decision raises issues of a constitutional dimension since it impinges upon the exercise of rights of political association.

The court of appeals also effectively addressed the question left open by this Court in *Bourjaily* v. *United States*, ___ U.S. ___, 107 S. Ct. 2775 (1987): whether the existence of a criminal conspiracy for purposes of determining the admissibility of a coconspirator's hearsay statements can be established by the statements alone. Although the court of appeals adverted to independent evidence, this evidence on its face is irrelevant to the purported conspiracy. Thus, only the coconspirator's hearsay statements could serve as the basis for their own admission. The Court should reject this bootstrapping approach. It is inconsistent with the rationale for the coconspirator hearsay exclusion. Moreover, the defect of hearsay—unreliability—is compounded in the case of coconspirator statements. Testimony potentially prejudicial to a defendant in a

criminal case should not be admitted on such a weak basis.

I. A Juror May Not Be Disqualified Solely On The Basis Of Political Association

A. The Court Of Appeals' Decision Is In Conflict With The Decision Of The Court Of Appeals Of Another Circuit

The decision below is squarely in conflict with the decision of the United States Court of Appeals for the Third Circuit which has held that the determination of a juror's eligibility solely on the basis of the juror's external associations threatens the right of an accused to an impartial jury and the integrity of the judicial process as a whole. *United States* v. *Salamone*, 800 F.2d 1216 (3d Cir. 1986). In *Salamone*, a criminal prosecution under the gun control statutes, the district court excused for cause one potential juror and five alternates due to their affiliation with the National Rifle Association ("NRA"). The defendant appealed his conviction on the ground that the district court systematically excluded from the jury all prospective jurors who opposed gun control without determining whether individual prospective jurors would in every case acquit because the charges involved the possession of weapons.

Although Rule 24(c) of the Federal Rules of Criminal Procedure permits a trial judge to disqualify a juror after the trial has commenced, the Third Circuit in *Salamone* stated that a judge's discretion to remove jurors is not without limitation. *Id.* at 1224. In exercising its discretion, the trial court must exercise fairness and zealously protect the rights of the accused. Thus, the Third Circuit held that a judge is obligated to determine whether the juror can put aside his personal beliefs and apply the law to the facts.

Without a finding of actual bias, a trial court should not impute bias solely on the basis of a juror's affiliations. *Id.* at 1226.

The Third Circuit found that the exclusion of NRA members from the jury was prejudicial error. Responding to the government's assertion that the trial judge was justified in disqualifying jurors on a theory of "implied bias," the court stated:

> We find the government's position untenable and potentially dangerous. To allow trial judges and prosecutors to determine juror eligibility based solely on their perceptions of the external associations of a juror threatens the heretofore guarded right of an accused to a fair trial by an impartial jury as well as the integrity of the judicial process as a whole. Taken to its illogical conclusion, the government's position would sanction, *inter alia*, the summary exclusion for cause of NAACP members from cases seeking the enforcement of civil rights statutes, Moral Majority activists from pornography cases, Catholics from cases involving abortion clinic protests, members of NOW from sex discrimination cases, and subscribers to Consumer Reports from cases involving products liability claims. *Id.* at 1225.

The Eighth Circuit has upheld the theory of implied bias rejected by the Third Circuit in *Salamone*. It affirmed the district court's finding that juror Noell's bias in favor of defendant Campbell could be implied on the basis of the political affiliation of Noell's parents-in-law. In the bench conference in which the dis-

trict court judge recorded his reasons for disqualifying juror Noell, the judge stated that his *sole* reason was that Noell's in-laws were Republicans from Newton County. App. B at 16a. The district court judge declined to ask juror Noell questions which may have enabled the judge to conclude that Noell himself was not able to objectively assess defendant Campbell's guilt or innocence. For instance, the judge could have asked Noell whether he had received a culvert from petitioner through Noell's father-in-law, as the tipster apparently informed the F.B.I. agent. Or, more to the point, the judge could have asked Noell whether his in-laws' political affiliations would influence his assessment of defendant Campbell's guilt or innocence. Even more to the point, the judge could have asked Noell whether his own political beliefs would prevent him from deciding the case impartially. Instead, the judge relied solely on his own perception of the import of the party affiliation of Noell's in-laws to disqualify juror Noell.

The Court should grant certiorari in order to resolve the conflict between the Third and Eighth Circuits, affirm that a juror's political associations afford no basis for disqualification, and grant petitioner a new trial. As the Third Circuit held in *Salamone*, the arbitrary and irrational exclusion of a juror because of external associations is presumptively prejudicial. Petitioner should not be required to demonstrate actual prejudice since proof of what could have happened absent the trial court's error is virtually impossible. *Peters* v. *Kiff*, 407 U.S. 493, 504 (1972). Nevertheless, petitioner is entitled to a trial by the original twelve jurors, *United States* v. *Jorn*, 400 U.S. 470, 484 (1971), and denial of that right works a

substantial prejudice upon him. Moreover, the prejudice is not only to petitioner, but also to the integrity of the judicial process. *United States* v. *Salamone*, 800 F.2d at 1229; *Ballard* v. *United States*, 329 U.S. 187, 195 (1946). Petitioner's conviction should not be permitted to stand where the district judge erroneously altered the composition of the jury impanelled to determine his guilt or innocence.

B. The Court Of Appeals' Decision Is In Conflict With The Decisions Of This Court

This Court has long held that a juror may not be excluded solely on the basis of group affiliations and the bias presumed to follow from such affiliations. *Smith* v. *Phillips*, 455 U.S. 209, 215-19 (1982); *Dennis* v. *United States*, 339 U.S. 162 (1950). In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), the clerk of the court and the jury commissioner deliberately had excluded from the jury lists all daily wage earners because they felt that daily wage earners would be unable to miss work in order to serve as jurors. The plaintiff objected to the formation of the jury pool at *voir dire* because of the systematic exclusion of daily wage earners from the jury. The Court held that the mere association of a prospective juror with a definable group could not serve as the basis for a juror's disqualification, reversed a judgment for the plaintiff and ordered a new trial. *Id.* at 225; *see Taylor* v. *Louisiana*, 419 U.S. 692 (1975). Accordingly, like the Third Circuit, this Court has determined that, before disqualifying a juror, a judge should determine that the juror has a *personal* bias which will prohibit him from making a fair judgment in a particular case.

The Eighth Circuit's decision in this case disregards that principle. Indeed, its decision is inconsistent with

the concept of the jury system. As the Court stated in *Thiel*:

> Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. 328 U.S. at 220.

The illegitimacy of the resort to group or class affiliations in determining juror qualifications is even greater when the association used to exclude jurors is political. The right of political association is among the rights guaranteed by the Constitution. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). The exercise of this right, absent a showing of bias disabling a juror from impartially deciding the case, can scarcely serve as a basis for disqualification of the juror. Eligibility for jury service cannot be reserved for the politically apathetic. The Eighth Circuit, however, has endorsed such a view. The Court should grant certiorari to vindicate the principle that political affiliation, standing alone, does not disqualify a person from serving as a juror.

II. The Hearsay Statements Of Defendant's Alleged Coconspirator Were Admitted Without Sufficient Independent Evidence Of The Existence Of A Conspiracy

Rule 801(d)(2)(E) of the Federal Rules of Evidence makes admissible against a party a statement by a coconspirator during the course of and in furtherance of a conspiracy. The rule balances the need for co-

conspirators' statements in combatting a form of criminal activity that is difficult of proof and the need to protect the accused against the unreliability of the hearsay statements of alleged coconspirators. Since the rule's adoption, courts have struggled to balance these competing needs. Although the courts have been sharply divided on a number of issues, they have unanimously held that before a coconspirator's statement can be admitted, it must be shown that: (1) the statement furthered the conspiracy; (2) the statement was made during the course of the conspiracy; and (3) the existence of the conspiracy and defendant's participation in it are proved. J.B. Weinstein & M.A. Berger, 4 *Weinstein's Evidence*, § 801 (d)(2)(E)[01], at 801-229, 253 (1987).

This Court recently addressed the last condition in *Bourjaily* v. *United States*, ___ U.S. ___, 107 S.Ct. 2775 (1987). In *Bourjaily*, a drug conspiracy case, the Court stated that a *per se* rule barring consideration of hearsay statements during preliminary fact finding is not required, since individual items of evidence, insufficient to prove a point by themselves, may prove it when used cumulatively. However, the Court specifically left open the question of whether the courts below can rely solely upon a coconspirator's hearsay to establish a conspiracy. *Id.* at 2781-82. In *Bourjaily*, the testimony of the alleged coconspirator was corroborated by independent evidence.

The case at bar raises the precise question left open in *Bourjaily*. The Eighth Circuit's decision is a *de facto* holding that a coconspirator's statements alone

can establish a conspiracy.[5] The court of appeals' holding on the admission of Holt's testimony was as follows:

> Non-hearsay testimony and documentary evidence was offered to show that Campbell and Holt, acting individually, bought absentee voting materials from various persons, including Pamela Cross, Penny Ann Carter, and the Boughs, and that Holt was a precinct worker for Campbell. There was also evidence that Campbell and Charles Clark, acting together, negotiated with Joe and Teena Brown to purchase their absentee votes and those of their relatives—Roger, Delmar and Gwenda Brown—for $50.00 each. Together with Holt's statements that he would take the voting materials he had purchased from the Boughs to Campbell for completion, the evidence was sufficient to support the district court's finding that a vote-buying conspiracy had been established. App. A at 11a.

When the evidence is analyzed, however, the only evidence that even begins to indicate a conspiracy between Campbell and Holt is Holt's hearsay testimony. Evidence that Holt and Campbell acted *individually* to obtain absentee ballots does not pertain to the existence of a conspiracy. In fact it proves the opposite—that Holt and Campbell were acting individually. Evidence that Campbell and *Clark* acted together again has nothing to do with an alleged

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[5] The district court's finding of a conspiracy was conclusory and unsupported by citation of any specific evidence. App. B at 26a-28a, 29a-31a.

conspiracy between Campbell and Holt. Lastly, Holt's role as a campaign worker for Campbell's reelection campaign is hardly significant. Campbell's campaign had approximately seventy campaign workers. App. B at 28a-29a. Thus, the only evidence cited by the court of appeals that supports the existence of a conspiracy between Holt and Campbell is Holt's hearsay testimony.

This Court should resolve that a coconspirator's hearsay should not be admitted unless corroborated by independent evidence. The historical underpinnings of the coconspirator exception to the hearsay rule and the inherent unreliabiiity of coconspirator hearsay support this position.

Historically, the courts' justification for permitting coconspirator hearsay is that it amounts to an admission of a party opponent and is, hence, reliable. The agency theory of conspiracy has enabled courts to make this analogy to the admission of a party opponent. *Van Riper* v. *United States*, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926); *see also* 4 *Weinstein's Evidence*, § 801(d)(2)(E)[01], at 801-232-33; Comment, *Reason and the Rules: Personal Knowledge and Coconspirator Hearsay*, 135 Penn. L. Rev. 1265, 1270-74 (1987). Under the agency theory, all coconspirators are agents of one another. They have the same interests, and their statements are presumptively sanctioned by their coconspirators.

The analogy to the admission of a party opponent breaks down, however, unless the agency relationship is proven. It is a well-established principle of agency that an agent's statement alone cannot be used to prove the existence of an agency relationship. *United States* v. *Bensinger Co.*, 430 F.2d 584, 593 (8th Cir.

Restatement (Second) of Agency, § 285 (1958). The reason for this rule is that if an agent's statement has not been authorized or sanctioned by the alleged principal, no agency relationship can be established. 4 *Wigmore on Evidence*, § 1078, at 176; *Restatement (Second) of Agency* at § 285. Thus, without the requirement of independent evidence to corroborate coconspirator hearsay, the justification for the statement's reliability, *i.e.*, the agency relationship, is lost. If coconspirator hearsay were admissible without substantiation, the hearsay could no longer be viewed as the statement of a party opponent and would no longer meet the requirements of the Sixth Amendment.

An even more compelling reason to exclude hearsay statements of alleged coconspirators without substantiation is that they are inherently unreliable. As Justice Blackmun stated in *Bourjaily*:

> It has long been understood that such statements in some cases may constitute, at best, nothing more than the "idle chatter" of a declarant or, at worst, malicious gossip. *Bourjaily* v. *United States*, ___ U.S. at ___, 107 S.Ct. at 2790 (Blackmun, J., dissenting).

Coconspirator's statements without corroboration are unreliable because they are the statements of criminals who may have an incentive to lie to further their criminal activity, strike a deal, or exculpate themselves. Alternatively, a coconspirator may be "puffing" to convince a third party that a criminal operation is more sophisticated than it is in fact. The possibility of dishonesty dictates that, at a minimum, *some* independent evidence must be required to reduce the unreliability of coconspirators' statements.

some independent evidence must be required to reduce the unreliability of coconspirators' statements.

In light of the inherent unreliability of coconspirator hearsay, the circuit courts have followed the approach approved in *Bourjaily* and carefully based a finding of conspiracy on at least some nonhearsay, independent evidence. *See, e.g., United States* v. *Knigge*, 832 F.2d 1100 (9th Cir. 1987); *United States* v. *Crespo di Hano*, 830 F.2d 1532 (9th Cir. 1987); *United States* v. *Castillo*, 830 F.2d 99 (7th Cir. 1987); *United States* v. *Hernandez*, 829 F.2d 988 (10th Cir. 1987); *United States* v. *Reynolds*, 828 F.2d 46 (1st Cir. 1987); *United States* v. *Martinez*, 825 F.2d 1451, 1452-53 (10th Cir. 1987); *United States* v. *Perez*, 823 F.2d 854 (5th Cir. 1987).

The only circuit to decline to follow the *Bourjaily* approach is the Eighth Circuit.[6] The conflict of decisions created by the court of appeals' ruling in this case should be promptly eliminated. This Court should grant certiorari to address the question of whether courts may rely solely upon coconspirators' hearsay statements to determine that a conspiracy has been established by a preponderance of the evidence. The hearsay testimony of Holt incriminated Campbell and inevitably tainted the jury's deliberations. The improper admission of these statements was grounds for a mistrial. *Burton* v. *United States*, 391 U.S. 123

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[6] The Eighth Circuit in the past has taken a broader view of the coconspirator hearsay exception and indicated support for the admissibility of hearsay testimony regardless of the lack of independent proof of a conspiracy. *See United States* v. *Cerone*, 830 F.2d 938 (8th Cir. 1987), *cert. denied*, ___U.S. ___, 108 S.Ct. 1730 (1988).

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted

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July 1988

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

No. 87-1935.

UNITED STATES OF AMERICA,

Appellee,

v.

ALTON CAMPBELL,

Appellant.

Submitted Jan. 14, 1988.
Decided April 29, 1988.

Thomas A. Martin, Jasper, Ark., for appellant.

Larry R. McCord, Fort Smith, Ark., for appellee.

Before JOHN R. GIBSON and MAGILL, Circuit Judges, and FLOYD R. GIBSON, Senior Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Alton Campbell appeals his conviction of two counts of paying or offering to pay voters for voting in violation of 42 U.S.C. § 1973i(c) (1982). Campbell, county judge of Newton County, Arkansas, was acquitted of twelve counts of vote-buying, one count of voting more than once, 42 U.S.C. § 1973i(e) (1982), and one count of conspiracy, 18 U.S.C. § 371 (1982). On appeal, Campbell argues that there was insufficient evidence to support the count relating to the ballot of Pamela Cross and that the district court[1] erred in replacing a juror with an alternate, in refusing

[1] The Honorable H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas.

to allow his counsel to cross-examine witnesses about witness fees received from the government, and in allowing testimony under the co-conspirator exception to the hearsay rule. We affirm the judgment of the district court.

Campbell was a candidate for re-election as county judge of Newton County, Arkansas at the general election on November 4, 1986, at which time a U.S. Senator and Representative and various state and county officers were to be elected. There was testimony that Campbell and Charles Clark, a candidate for Newton County sheriff, approached a number of individuals for purchase of their votes. There was also testimony that Dennis "Cotton" Holt, a precinct worker for Campbell, purchased absentee ballots from voters on behalf of Campbell, and that Campbell personally paid Pamela Cross $50.00 in exchange for a blank absentee ballot and Penny Ann Carter $30.00 for voting absentee. Ultimately, an indictment was filed charging Campbell with fourteen counts of vote-buying, one count of multiple voting, and one count of conspiracy. Charles Clark was named in eight counts of the indictment and Dennis Holt was charged in six counts. The case was tried to a jury and Campbell was convicted of the two counts involving Pamela Cross and Penny Ann Carter, but acquitted on all other counts. Clark and Holt were acquitted on all counts.

Following the second day of trial, FBI Agent Lynn Willett notified the district attorney that she had received a call from a citizen of Newton County, who informed her that one of the jurors, Robin Noell, was the son-in-law of two people from Newton County who were close to Campbell and had worked for him during the election. According to the agent and the district attorney, records in the case indicated that one of Noell's parents-in-law had picked up an absentee ballot and the other had picked up more than one ballot, perhaps as many as five. The caller also informed Agent Willett that Noell had received a culvert, which he had put to personal use, from the county judge through his father-in-law. The district attorney conveyed

this information to the court on the third and final morning of trial.

After conclusion of the testimony, arguments of counsel and instructions, the jury was escorted to the jury room. The court had directed the jury not to begin deliberations until two of the fourteen jurors were excused and the marshal handed out the verdict forms to the remaining twelve. Over the objection of the defendants, the marshal then escorted Noell to the judge's chambers for questioning. Noell said he was aware that his parents-in-law knew Campbell, but did not know whether they had worked for him. The district judge was familiar with Newton County and aware of strong partisan feelings there; Republicans were usually very close to other Republicans, and Democrats very close to other Democrats. The district court believed that this information provided sufficient grounds to excuse Noell, and therefore did not question him about the culvert. The court discharged Noell and one other juror and directed the remaining twelve to begin deliberations.

After the jury had retired to consider its verdict, the court held a bench conference and made a record of the events surrounding Noell's removal. The parties had agreed that the court could decide whether to excuse Noell on the basis of this information, without the presentation of testimony. Campbell also agreed that once the court had spoken to Noell, it had no choice but to strike him. Campbell objected specifically to the court's decision to question Noell on the basis of the district attorney's report and the court's knowledge of the strong partisan feelings in Newton County.

I.

The Federal Rules of Criminal Procedure provide that alternate jurors shall replace jurors who "become or are

found to be unable or disqualified to perform their duties."[2] We have held that rulings on the qualification of jurors will not be disturbed "absent a clear showing of abuse of the sound discretion vested in the district court." *United States v. Brown,* 540 F.2d 364, 379 (8th Cir. 1976). The decision to excuse a juror for cause and substitute an alternate is therefore vested in the district court's discretion, *United States v. Lewis,* 759 F.2d 1316, 1350 (8th Cir.), *cert. denied,* 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 357 (1985), and will be upheld if the record shows a legitimate basis for the court's decision. *United States v. Key,* 717 F.2d 1206, 1209 (8th Cir. 1983).

The district court did not abuse its discretion in questioning juror Noell. The words "or are found to be [disqualified]" were added to Rule 24(c) in a 1966 amendment to make clear that an alternate may be called when the court discovers during trial that a regular juror was disqualified to serve at the time he was sworn. Fed.R.Crim.P. 24(c) advisory committee's note (citing *United States v. Goldberg,* 330 F.2d 30 (3d Cir.), *cert. denied,* 377 U.S. 953, 84 S.Ct. 1630, 12 L.Ed. 2d 497 (1964)). A district court has the discretion to question a juror whose qualifications have been called into doubt during trial in order to resolve such matters as they arise and ensure an impartial and competent jury. *See, e.g., United States v. Lustig,* 555 F.2d 737, 745-46 (9th Cir.), *cert. denied,* 434 U.S. 926, 98 S.Ct.

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[2] Fed.R.Crim.P. 24(c) provides:

> Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. * * * Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled * * *.

408, 54 L.Ed.2d 285 (1977), 434 U.S. 1045, 98 S.Ct. 889, 54 L.Ed.2d 795 (1978); *United States v. Zambito*, 315 F.2d 266, 269 (4th Cir.), *cert. denied*, 373 U.S. 924, 83 S.Ct. 1524, 10 L.Ed.2d 423 (1963); *Banks v. United States*, 204 F.2d 666, 671 (8th Cir. 1953), *vacated and remanded on other grounds*, 348 U.S. 905, 75 S.Ct. 311, 99 L.Ed. 710 (1955). The information provided by the district attorney, based upon Agent Willett's report and the records, raised a serious question about Noell's impartiality, and the court did not err in investigating the matter. *Cf. United States v. Dean*, 667 F.2d 729, 731 (8th Cir.), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982) (en banc) (court could have investigated "rumor" of juror bias had it been informed of note received by counsel).

Nor did the district court abuse its discretion in excusing Noell. Campbell argues that the government did not show cause for striking Noell, and that by removing him the court in effect gave the government an additional peremptory strike. This argument simply misses the mark. The district court took up the matter on its own motion and removed Noell in the exercise of its discretion under Rule 24(c). *E.g., Lewis*, 759 F.2d at 1350. Noell confirmed that he was aware his parents-in-law knew Campbell, and the records mentioned by Agent Willett and the district attorney indicated that Noell's in-laws had worked for Campbell during the election. The district judge also knew that partisan feelings in Newton County ran high. The court was concerned that any of these factors might affect Noell's impartiality, and it did not err in excusing Noell on this basis. *Cf. United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984) (relationship between juror and defendant, albeit remote, can form basis of challenge for cause); *Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983) (juror who knew defendant sheriff and attended political functions involving him properly excused).[3]

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[3] The central thrust of Campbell's argument is the removal of juror

The district court also did not violate the sixth amendment's "fair cross-section" requirement by questioning and excusing Noell and a number of potential jurors in part on the basis of the court's familiarity with Newton County politics. There has been no allegation that Newton County residents are systematically excluded from, and therefore underrepresented in, venires from which juries for the Western District of Arkansas are selected. On this ground alone, Campbell's sixth amendment claim should be dismissed. *See Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1764-65, 90 L.Ed.2d 137 (1986). Moreover, this case is narrowly focused upon conduct surrounding the 1986 campaign and November election in Newton County, and the district court was justifiably concerned that residents of this small rural county and others closely associated with them might be predisposed in their views of the case. The court's experience with the strength of partisan feelings in Newton County merely reinforced this concern. The court questioned and excused Noell and the others on grounds related solely to their ability to serve as jurors in this particular case, and no sixth amendment "fair cross-section" claim can be predicated upon such action. *See id.* 106 S.Ct. at 1765-66.

Finally, we reject Campbell's argument that he was prejudiced because his attorney directed his efforts to the orig-

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Noell. Noell was questioned by the court in chambers without counsel present and without a record being made. After questioning Noell and excusing him, the district court later made a record in open court outside the presence of the jury, but before counsel and the parties. Campbell has not objected to this procedure, except to argue that the court should have conducted an evidentiary hearing to resolve the matter. The statements of the court and the district attorney on the record, coupled with Campbell's agreement that the presentation of testimony was not necessary, answer this argument. *See Lewis*, 759 F.2d at 1350. While the procedures used to ascertain the qualifications of a juror are within the discretion of the district court, we believe questioning the witness on the record with counsel present is a more desirable practice and would alleviate the possibility of procedural objections that have not been made in this case.

inal twelve jurors, ignoring the alternates. We should not reward a lawyer's decision to concentrate on a few select jurors. Rule 24(c) states that alternates "shall have the same functions, powers, facilities and privileges as regular jurors." Reversal is not warranted merely because the substitution of an alternate changes the composition of the jury. *See United States v. Giarratano*, 622 F.2d 153, 157 (5th Cir. 1980). The district court did not err in removing Noell.

II.

Campbell next argues that there was insufficient evidence to support his conviction under 42 U.S.C. § 1973i(c) for paying or offering to pay Pamela Cross to vote.[4] Campbell acknowledges that Cross testified that she gave Campbell her absentee voter statement and blank absentee ballot in return for $50.00. He argues, however, that there was no evidence Cross was paid for voting, because Cross testified that she did not personally complete the absentee ballot by marking her candidate selections. Campbell is alleged to have done so and he argues that even if he did, the only crime of which he could be convicted was voting more than once in violation of 42 U.S.C. § 1973i(e). Campbell emphasizes that a criminal statute must give fair warning of the conduct it prohibits. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 350-51, 84 S.Ct. 1697, 1700-01, 12 L.Ed.2d 894 (1964).

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[4] Section 1973i(c) provides:

> Whoever knowingly or willfully * * * pays or offers to pay * * * for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both; *Provided, however*, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for [specified federal offices].

There is no dispute that the November 4, 1986 general election was held in part for the purpose of electing candidates to federal offices specified in section 1973i(c).

In considering the sufficiency of the evidence to support a jury verdict, we view the evidence in the light most favorable to the government, giving the government the benefit of all inferences which may logically be drawn therefrom. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Resnick*, 745 F.2d 1179, 1185 (8th Cir. 1984). The evidence need not exclude every reasonable hypothesis of innocence, but simply "be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty." *United States v. Wells*, 721 F.2d 1160, 1161 (8th Cir. 1983) (quoting *United States v. Taylor*, 599 F.2d 832, 838 (8th Cir. 1979)). This court may overturn the verdict only if the evidence is such that "a reasonable-minded jury *must* have entertained a reasonable doubt as to the government's proof of one of the essential elements of the offense." *United States v. Noibi*, 780 F.2d 1419, 1421 (8th Cir. 1986).

Pamela Cross testified that she signed an application for an absentee ballot at the county courthouse some time before the election and obtained an absentee ballot and a statement of absentee voter. She then went to a bridge in Jasper, Arkansas, where her husband was evidently filling the radiator of their vehicle with water. Campbell drove out and met Cross beneath the bridge. Cross then signed the statement and gave it and the blank ballot to Campbell in exchange for $50.00. The government offered Cross's application into evidence at trial.

The evidence, viewed in the light most favorable to the government, was plainly sufficient to convince the jury beyond a reasonable doubt that Campbell knowingly paid Cross $50.00 for the purpose of obtaining her blank absentee ballot and absentee voter statement. We reject Campbell's argument that this conduct did not constitute "paying for voting" within the meaning of section 1973i(c). The Fourth Circuit has held, and we agree, that section 1973i(c) plainly prohibits an individual from paying a voter and then filling out or helping the voter to fill out an

absentee ballot. *United States v. Carmichael*, 685 F.2d 903, 908 (4th Cir. 1982), *cert. denied*, 459 U.S. 1202, 103 S.Ct. 1187, 75 L.Ed.2d 434 (1983); *United States v. Mason*, 673 F.2d 737, 739-40 (4th Cir. 1982). Campbell's actions were equivalent to paying Cross for marking her ballot in accordance with his directions, and the statute gave Campbell fair warning that his conduct was unlawful. *See e.g., Bouie*, 378 U.S. at 350-51, 84 S.Ct. at 1700-01.

III.

Campbell's third argument is that the district court violated his sixth amendment confrontation clause rights by refusing to allow him to cross-examine witnesses about witness fees they were to receive from the government. A defendant's confrontation clause rights are violated if he is prevented from exposing facts to the jury from which they could reasonably make inferences about the reliability of the witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). The availability of other opportunities during cross-examination to elicit the same information is significant in resolving the matter. *United States v. Wilson*, 787 F.2d 375, 386–87 (8th Cir.), *cert. denied*, ___ U.S. ___, ___, 107 S.Ct. 197, 223, 93 L.Ed.2d 129, 151 (1986). The district court retains broad discretion to limit cross-examination beyond that necessary to satisfy the sixth amendment, *id.* at 386, and its decisions on such matters may be reversed only when there has been a clear abuse of discretion and a showing of prejudice to the defendant. *United States v. Lee*, 743 F.2d 1240, 1249 (8th Cir. 1984).

Counsel for Campbell attempted to cross-examine two government witnesses about fees they were to receive from the government, and in each instance the district court instructed the jury that all witnesses, whether called by the government or the defense, were entitled to a statutorily-prescribed witness fee plus mileage. The court then sustained objections to further questioning about these fees.

Witness and mileage fees are provided by law to facilitate the attendance of witnesses and production of testimony at trial, and they are paid to witnesses for both the prosecution and defense. We do not believe that such payments give rise to any inference affecting credibility. There was no allegation that government witnesses would receive anything more for their testimony, nor did Campbell attempt to cross-examine them on the subject. Campbell was allowed to ask whether the government had either told the witnesses that charges for vote-selling would not be brought against them if they testified, or threatened legal action if the witnesses did not testify as the government wanted. Campbell was thus permitted to inquire whether the witnesses had a motive to favor the prosecution in their testimony. *See Van Arsdall*, 107 S.Ct. at 1435. The district court did not violate Campbell's confrontation clause rights nor abuse its discretion in limiting the cross-examination.

IV.

Campbell's final argument is that the district court erred in allowing the testimony of Jack and Wanda Bough regarding statements made to them by Dennis Holt. Holt told the Boughs that he would give Campbell the absentee voter statements and ballots he had bought from them and that Campbell would finish filling them out. Campbell concedes that after *Bourjaily v. United States*, ___ U.S. ___, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), a district court may consider the hearsay statements sought to be admitted in making the factual findings necessary to determine whether the statements are admissible under the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E). Reply Brief for Appellant at 3. *See Bourjaily*, 107 S.Ct. at 2782; *contra United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). Campbell argues, however, that a district court may not rely solely on such statements to

determine that a conspiracy has been established, and that the district court impermissibly did so here.

The Supreme Court expressly reserved ruling on this issue in *Bourjaily*, 107 S.Ct. at 2781–82, and it is not necessary for us to resolve the matter. Following the procedure outlined in *Bell*, 573 F.2d at 1044, the district court conditionally admitted the Boughs' testimony regarding Holt's statements. At the close of the evidence, it ruled that the testimony was admissible, finding that the government had proven by a preponderance of the evidence that a vote-buying conspiracy existed, that Campbell and Holt were members of the conspiracy, and that Holt's statements were made during the course and in furtherance of the conspiracy. *See Bourjaily*, 107 S.Ct. at 2778–79; *Bell*, 573 F.2d at 1043–44. We have reviewed the record, and we cannot say the district court erred in so finding. Non-hearsay testimony and documentary evidence was offered to show that Campbell and Holt, acting individually, bought absentee voting materials from various persons, including Pamela Cross, Penny Ann Carter, and the Boughs, and that Holt was a precinct worker for Campbell. There was also evidence that Campbell and Charles Clark, acting together, negotiated with Joe and Teena Brown to purchase their absentee votes and those of their relatives—Roger, Delmar and Gwenda Brown—for $50.00 each. Campbell later paid Joe Brown $250.00 for the five blank absentee ballots. Together with Holt's statements that he would take the voting materials he had purchased from the Boughs to Campbell for completion, the evidence was sufficient to support the district court's finding that a vote-buying conspiracy had been established.[5]

The judgment of the district court is affirmed.

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[5] Holt's statements to the Boughs did not constitute an oral confession that he and Campbell had conspired to buy votes, and we therefore

APPENDIX B

Excerpts Of The Transcript Of The Trial Before The District Court—June 14-17, 1987

Trial transcript, Vol. 1, pp. 14–15, follows:

THE COURT: Is that correct, ma'am? All right. Thank you very much. Anyone else? I'm going to ask about which of you are from Newton County here in a moment but anyone else know anybody who professes to know something about this case? Again, leaving out newspapers and television for a little bit, do any of you believe you know something about this case from some other source that I haven't covered? I know there's been some newspaper stories when it all happened maybe and a recent one, I'm not sure. But do any of you know anything about this case from any source other than the news media perhaps? Let me see how many of you are from Newton County. Don't we have one juror here from Newton County? I thought we did. I guess the lady there, you're not from Newton County are you? None of the rest of you as I understand it live in Newton County, is that correct? Do any of the rest of you have close relatives, mother, father, brother, sister, that kind of thing, living in Newton County? Yes sir. Would you stand and tell us who you are?

JUROR: Robin Noell.

THE COURT: I'm sorry?

JUROR: Robin Noell.

THE COURT: Spell the last name.

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reject as groundless Campbell's argument that admission of the Boughs' testimony was prohibited by *Bruton v. United States*, 391 U.S. 123, 123-26, 88 S.Ct. 1620, 1620-22, 20 L.Ed.2d 476 (1968). For the reasons stated in our discussion of the sufficiency of the evidence, we also reject Campbell's argument that the Boughs' testimony was relevant only to a charge of conspiring to vote more than once.

JUROR: N-O-E-L-L.

THE COURT: All right. What relatives do you have living in Newton County?

JUROR: I've got some in-laws.

THE COURT: All right. Did you live there?

JUROR: No.

THE COURT: All right. Have any of your in-laws ever talked to you about this case?

JUROR: No.

THE COURT: Do you know anything about it other than what you may have read in the newspaper or heard here today?

JUROR: No, I don't know anything about it.

THE COURT: Can you decide the case on what happens in the courtroom?

JUROR: Yes sir.

THE COURT: Thank you very much, sir. I take it that none of the rest of you are either from Newton County or have close relatives and in-laws are close relatives, living—well, sometimes we don't want them to be but they are—living in Newton County?

Trial transcript, Vol. 1, pp. 39-40, follows:

THE COURT: All right. I thought you were not living in Newton County.

JUROR: Pardon me?

THE COURT: I thought you didn't live in Newton County.

JUROR: Yes sir, I still do.

THE COURT: All right. Would the fact that you live in Newton County cause you not to want to be on this case if you were the Government lawyer?

JUROR: Yes sir.

THE COURT: All right. You may be excused, thank you ma'am. Now let me make sure. Is that all the Newton County residents that are here? I thought awhile ago everybody was gone but I guess she was still here. Any Newton County residents left? I take it there are not. Let me ask that question again. If you were the U.S. Attorney with a duty to prosecute this case, is there anything in your mind that would cause you not to want you on this particular case? If you were that guy—if you were the fellow sitting right there, Mr. Fitzhugh or Mr. McCord, would you want you on this case? By the same token, if you were one of the defendants who is entitled to a fair trial, who is entitled to a jury that will believe, will say and believe that they're innocent until proven guilty beyond a reasonable doubt. If you were one of these defendants, is there anything in your state of mind that would cause you not to want you on this particular case?

Trial transcript, Vol. 3, pp. 102-109, follows:

BENCH CONFERENCE

THE COURT: We're going to do this in a bench conference even though the jury is out because the jury in this courtroom, as you all know, is right next door. I can never be sure that they're not hearing what's going on when we have open court kinds of things when they're in there. The record should reflect—I don't think it reflects anything in relation to this yet. The record should reflect that the U. S. Attorney first thing this morning advised the Court and had Ms. Lynn—what's her last name?

MR. FITZHUGH: Willett.

THE COURT: Ms. Lynn Willett, an FBI agent there, and she's here for testimony if that proves to be necessary, but they advised me that Ms. Willett had received a telephone call from a citizen last night who identified themselves as being as citizen of Newton County, advising that one of the jurors, Mr. Noell—he was juror number nine—Robin Noell, is the son-in-law of two people from Newton County named Athel Greenhaw—A-T-H-E-L, and Mary Greenhaw. Now someone reminded me when we were talking about this in chambers that that young man did in fact in answer to a question advised the Court and others that he had relatives—I believe he said he had in-laws living in Newton County. Ms. Willett's information was that the Greenhaws were close to Alton Campbell, and in fact worked for him during the election. I believe the records would reflect according to the FBI agent that one of those persons picked up an absentee ballot and the other one picked up more than one, I don't know how many. Mr. McCord, do you remember how many?

MR. McCORD: Five if I recall correctly.

THE COURT: One of them picked up five perhaps, anyway more than one. The other one picked up one. As I told you I was going to do in chambers, and the defendants by the way for the record have objected to this in chambers. I knew their views on it already. But as I said I was going to do in chambers, I called in Mr. Noell and asked him about that. He I think is an honest young man. I don't believe for a minute that he was doing anything wrong, I think he answered the questions he was asked. But he said yes, he knew that they knew Sheriff—or Judge Campbell, he professes not to know whether they worked for him or not. He says that they are very private people, they keep their business including their political business to themselves. He says he had no information one way or the other about that. I did not, because of that—I missed one other fact. This citizen also told Ms. Willett that in fact Mr. Noell, the son-in-law, the juror, had received

through his father-in-law from the county judge a culvert that he used for his personal use. I did not ask Mr. Noell that even though I said I would, because I did not want to embarrass him, so I thought at this point that the facts that I had were such that I was going to excuse the juror anyway because of the fact that we have two alternates. There is no reason to put him on the spot. If any of that information is correct, even if it's only correct that the Greenhaws are in fact Republicans down in Newton County and Mr. Martin has indicated in chambers that he believes them to be. I know what that means in Newton County from experience so based on that alone, the Court believes there is sufficient grounds to excuse that juror. The Court has excused that juror. Let me explain on what I mean about that. I'm not berating or trying to make—intending to make derrogatory remarks about Republicans or Democrats. Let me say that I know from experience having been a lawyer in this area and having tried a number of cases as a judge involving Newton County that they feel very strongly about their politics down there and they also—it's a very small county, very rural county. The Republicans are usually very close to other Republicans, the Democrats are usually very close to other Democrats. They feel very strongly about their candidates. So with those facts in mind the Court has excused Mr. Noell. I know there are objections to that and I will let you all make your record now in relation to them. I'm going to start with you, Mr. Martin, if you desire.

MR. MARTIN: I would object to it and move for a mistrial on grounds that it's—according to Mr. Noell's answers he is a competent juror and a juror to serve. He is a juror that in fact we believed would be—would listen to our case of course, like all jurors. We didn't strike him, neither did the Government. The Government had a chance to voir dire him and to strike him and to use one of their strikes in doing that. They didn't, therefore the Government gets an advantage by having a second bite at the

apple. The Government also—the grounds for striking him seem basically to be that he married someone from Newton County. And I just honestly don't think that any contact, particularly the choice of your mate, can disqualify someone almost as a matter of law. I just don't think that's fair. I think that Newton County is part of this district and we have a right to be judged by people who have had some familiarity with the county. I think that's what this ruling is tantamount to saying, that if any touch of Newton County so corrupts a person that he can't serve as a juror, I do believe that we are at a disadvantage at this point. I don't believe the juror—there's any reason to disqualify the juror and I think it is grounds for a mistrial. I also think and would point out that everything that has been said has been said exactly for this purpose—is that they've looked at this guy and said hey, we've got someone who might be favorable to the defendant, so let's get him off. Let's call up the Judge, and I think that is the kind of thing that just shouldn't happen. And I think that that exposes the system to more corruption perhaps than the possibility that Mr. Greenhaw might have a favorable disposition to the defendants if an outside influence can get him struck.

THE COURT: Well now, I'll let you all make a record in just a moment. Let me say that I don't—I personally don't mean by that in any way to be casting any reflections on citizens of Newton County based on the information that I had. And by the way, let me say this for the record and you all correct me if I'm wrong. I think that we agreed in chambers not that you would agree that this be done at all, but I believe we did agree that you didn't desire any testimony on it, that you would allow the Court to make this—whatever the Court intended to do without any testimony on it. Now isn't that a fair statement?

MR. ADAMS: That's a fair statement, Your Honor.

THE COURT: That's what happened in chambers. All right, because of that and because of the information that the Court had, the Court didn't believe that it had any choice but to call Mr. Noell in and ask him about it. After having once done that, and you all and I recognize that and that's the reason you all objected to it. After having once done that—you didn't agree with it, I'm not inferring that, but after having once done that and after having said to Mr. Noell, Mr. Noell, is it true that you in-laws are close to the county judge? He said if they are—he says I know they know them. Is aid do you know if they work for them or not? I don't know. Now even if that's true, even if he's telling the truth I've already—and I think I reasonably had to do that, but I've tainted that juror and I don't think I have any choice but to go ahead at that point and excuse him. So that's the—and you objected to it even being done at all, Mr. Martin, I understand that.

MR. MARTIN: Specifically that is my objection. I will say for the record that I agree with the Court that once he spoke to the jury he had no choice but to strike him.

THE COURT: Right, right.

MR. ADAMS: Your Honor, let me adopt Mr. Martin's argument on behalf of the defendant Charles Clark, and I would like to supplement the record a little bit, and the Court can certainly correct me if I'm wrong. That following the giving of the instructions to the jury the 14 jurors were to retire permanently to the jury room. That shortly thereafter the bailiff brought Mr. Noell from the jury room and took him to the judge's chambers. I would like to inquire of the judge as to what the bailiff said to Mr. Noell and what was—would have been heard by the other jurors in removing him from that room.

THE COURT: All right. The—well, of course I had already just before they went in had said the judge is going to have to decide which of the 12 jurors hear this case. The marshal, and we can also take evidence on this if you

all desire, it wouldn't hurt my feelings at all—but he says the judge wants to see you as he went into the jury room. Now let me also say this, the record will reflect this I think. The jury was instructed not to deliberate at all, the jury did not have time to deliberate at all because he was immediately brought out of the jury room as soon as I talked to him, which took maybe five, maybe four minutes—three or four minutes. We then brought the entire jury out and I did what I did on the record. So that ought to reflect that.

MR. ADAMS: Okay. Your Honor, I additionally move for a mistrial. I do not think that the remaining jurors can not help but know that there was some problem with Juror Noell and I think that the risk of that prejudicing the defendant's case is substantial. And for that reason I move for a mistrial.

THE COURT: I understand that.

MR. MARTIN: I would adopt those grounds for mistrial too.

THE COURT: I understand that.

MR. SMITH: On behalf of Dennis Holt, Your Honor, I make the same motions and adopt the reasoning of Mr. Martin and Mr. Adams.

THE COURT: All right. The record will reflect how the Court handled that. I don't think there is any real danger of that in view of the way the Court handled it, but—

MR. MARTIN: I'm sure the Court—I want to make it clear that once the Court made the decision that he had to talk to the juror I think the Court did everything else—

THE COURT: I understand, Mr. Martin.

MR. MARTIN: Okay.

THE COURT: Thank you very much.

MR. MARTIN: Thank you.

END OF BENCH CONFERENCE

Trial transcript, Vol. 2, pp. 52-54,testimony of Jack Bough, follows:

Q. Let me show you what's been marked for purposes of identification as Government Exhibit #33, Statement of Absentee Voter, and ask you if that looks like what the other piece of paper was?

A. Okay. This was the first one and this was the second one.

Q. All right. I've got them backwards but does this one also have your name on it?

A. Yes, sir.

Q. Jack E. Bough?

A. Sure do.

Q. Did you fill out the rest of it?

A. I filled out this one here and I signed my name on it up here.

Q. And then he filled out the rest of 32?

A. Right. Right.

Q. The application. And did you give them back to Mr. Holt?

A. Yes, sir.

Q. Did he say what he was going to do with them?

A. Take them in and let Alton Campbell have them and he'd finish them up.

Q. Okay. Did he come back to your house a few days—

MR. MARTIN: Objection, Your Honor.

THE COURT: What? I'm sorry. What'd he say? All right. Come on up.

BENCH CONFERENCE, ON THE RECORD

MR. MARTIN: Your Honor, my objection is that this is hearsay unless a conspiracy has been proven and shall—now, I understand that under the hearsay exception to the—you know, in the conspiracy rule, that this might be admissible. However, in order for it to be admissible the conspiracy must be shown and must be established independently and if it is not, then this testimony and the presentation of this testimony would be grounds for a mistrial.

THE COURT: Of course *U.S. v. Bell* and cases along that line are on point. That's 573 F.2d 1040. Let me advise the U.S. Attorney at this time that the Court will make as that—as that case requires the determination on whether or not those tests have been met, and you're familiar with those tests. If the Court determines that they have not been met, then the Court may mistry it unless the Court determines that a limiting instruction is proper but *U.S. v. Bell* applies and we'll make that determination on the record as *U.S. v. Bell* requires.

MR. MCCORD: I understand this may be permitted subject to establishing the—

THE COURT: Exactly.

MR. MCCORD: —conspiracy.

MR. MARTIN: With the objection I think timely made at this point.

THE COURT: All right. That's fine and that's the Court's ruling.

AFTER BENCH CONFERENCE

THE COURT: All right. You may continue.

By MR. MCCORD:

Q. Okay. Before the bench conference of the lawyers, Mr. Bough, I believe the last question I had asked you you

had stated that Mr. Holt had told you he was going to give those papers to Alton Campbell who would fill them out, is that correct?

A. Right.

Q. All right. Now then, did Mr. Holt return to your house a few days later?

A. Yes, sir.

Q. Okay. Did you sign one of those pieces of paper at that time or had you already signed both of them?

A. No. When he came back he brought this one here and an envelope and he opened the envelope up and handed us a—brought this one here out and we signed it.

Q. The envelope you're talking about, was it similar to government Exhibit #2?

A. Yes, sir.

Q. Okay. Now, did you ever see a ballot?

A. No, sir, never did see one.

Trial transcript, Vol. 2, pp. 66-69, testimony of Wanda Bough, follows:

Q. How much?

A. He said $40 at that time.

Q. Was it to be 40 between the two of you or 40 a piece?

A. 40 a piece.

Q. Okay. And did you and your husband agree to that?

A. Yes, sir.

Q. Now, Dennis Holt did he ask you to vote for him for any office?

A. No, sir.

Q. He wasn't running for anything was he?

A. No, sir.

Q. Okay. Did he tell you who he was paying to get the votes for?

A. He said would go to Alton Campbell and get the absentee ballot.

Q. All right. Now, did you have to sign any papers while he was there at your house?

A. Yes, sir.

Q. I'm going to show you Government Exhibit #34, an Application for Absentee Ballot, and see if you recognize that.

A. Yes, sir.

Q. And is that your signature, Wanda R. Bough?

A. Yes, sir.

Q. Up here its got a place checked and printed in it says I hereby authorize Dennis Holt to deliver this application, is that correct?

A. Yes, sir.

Q. Down here it's got another check mark and it says I authorize the delivery of my ballot to the final—to the following person: Dennis Holt, is that correct?

A. Yes. sir.

Q. Now after you signed those, what'd you do with it?

A. I presume he took it back with him.

Q. Did you fill out the rest of it or did he fill out the rest of it?

A. What do you mean, sir?

Q. The rest of that writing that's on there besides your signature.

A. That's his. The rest of it he filled it out on his own signature.

Q. Okay. And then did he take that with him after he left your house?

A. Yes.

Q. Okay. Did he say what he was going to do with it?

A. Take it to Alton Campbell.

Q. All right. Now did Mr. Holt come back to your house a few days later?

A. Yes, sir.

Q. Let me show you what's been marked as Government Exhibit #35 and ask if that looks familiar to you?

A. Yes, sir, it does.

Q. And did he have you sign that Statement of Absentee Voter on that occasion?

A. Yes, sir, he did.

Q. All right. Now, did you ever see your Absentee Ballot?

A. No, sir.

Q. I'll show you Government Exhibit #4 which has been introduced into evidence as a sample ballot that was used in that election. You never were given one of these by Mr. Holt or anybody?

A. No. No, sir.

Q. Did Mr. Holt tell you what would be done with your ballot?

A. It would be taken back to Alton Campbell and he would fill it out for us.

Q. Okay. Did Mr. Holt give you the money at that time?

A. Yes, sir.

Q. How much?

A. He gave us two twenty dollar bills.

Q. Did he give you two twenty's and your husband two twenty's or just two twenty's between you?

MR. MARTIN: Your Honor, for the record—

THE WITNESS: Two twenty dollar bills.

MR. MARTIN: Pardon me. For the record I think I need to make the continuing objection I have made as to this witness.

THE COURT: Yeah. I understand that you did—

MR. MARTIN: Okay.

THE COURT: —have that objection and I'll—

MR. MARTIN: I just wanted the record to—

THE COURT: —consider it the record to reflect that. Yeah, you do have a continuing objection. You're talking about on the *U.S. v. Bell* problem, right?

MR. MARTIN: Yes, I am, Your Honor.

THE COURT: All right. The Court recognizes that.

THE WITNESS: All I did was—

BY MR. MCCORD:

Q. I think I asked you if he gave two twenty's for you and your husband or did he give each of you two twenty's?

A. He gave each one of us two twenty dollar bills.

Q. Okay.

MR. MCCORD: At this time the United States would move for the introduction of Government Exhibits #34 and #35.

THE COURT: Same objections as earlier, the same ruling. The objections are overruled. They're received.

MR. MCCORD: Thank you, Mrs. Bough. I pass the witness.

Trial transcript, Vol. 2, pp. 85-87, follows:

MR. MARTIN: Your Honor, the defendant Alton Campbell, would move that Count 1, specifically the conspiracy count, as against Alton Campbell, be dismissed on grounds that there is no showing of any—assuming for purposes of argument on this count that there was proof of some wrongdoing by some of the parties somewhere or all of it, there is no showing upon which a reasonable person could conclude that there was any kind of conspiracy, that these three men joined together for any illegal purpose and in particularly an illegal purpose which could or reasonably could be expected to affect a federal election; that the requirements are that a conspiracy be proven independently and not be proven by specific illegal acts and that the combination simply was not proven by any direct evidence or by any circumstantial evidence and should be dismissed for a lack of substantial evidence.

THE COURT: Let me go ahead and take care of that now.

MR. MARTIN: Okay.

THE COURT: Because Ms. Criner's testimony does not touch that, I don't think, at all. I think her testimony on direct at least, and if it's changed on cross, but on direct at least it had to do with the individual case against Mr. Holt. The Court is going to deny the motion. The Court believes that there is sufficient evidence to allow the jury to consider whether or not there was a conspiracy between and among these defendants. I intend in a moment to say something specifically about the requirements set forth in *U.S. v. Bell* that I cited earlier in a bench conference, I

believe. I don't have much trouble at all saying that there is a jury question in relation to a conspiracy between Clark and Campbell because there was testimony that they met together—and this was very early in the trial—they met together at someone's house and made arrangements at least for those individuals to buy votes. I think there is sufficient independent evidence in relation to them that the jury ought to be allowed to determine whether they did in fact conspire to reach the results that the Government alleges they conspired to reach. There is more trouble in the Court's view, with Mr. Holt in that regard. The testimony that the Court allowed over the defendants' objection in relation to Mr. Holt saying—allegedly saying—I am doing this for Alton Campbell and I want to take these back to him—now the Court recognizes that while that evidence is admissible under the Court of Appeals holding in cases such as *U.S. v. Bell,* the Court must determine several things that that case says and I'm going to read a little bit of that so my reasons will be probably brought into focus a little bit better. The Court said, "Accordingly, we hold that an out of court statement is not hearsay and is admissible if, on the independent evidence, the District Court is satisfied that it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the deparent and the defendants were parties." And then the case goes on to tell trial courts that the Court has to make a specific finding on the record that the Court finds that the facts, the independent facts, more likely than not support a conclusion that there is sufficient evidence more likely than not by preponderance of the evidence that the defendants may have engaged in a conspiracy. In fact the case says that at the conclusion of all of the evidence that the Court will make an explicit determination for the record regarding the admissibility of the statements. The Court has a little more trouble with this testimony, as I've already indicated I do some of the rest of it. The Court believes

though that based on the testimony of various individuals about the way the ballots were obtained, the documents that were signed, who they were brought to, those kind of things, the Court does find that the Government has met its burden of proving that more likely than not that there was a conspiracy between the individuals and that these statements that Mr. Holt was alleged to have made by one or more of the witnesses were made in furtherance of that conspiracy, so the Court makes—I hope I've made, the specific finding required by *United States v. Bell,* 573 F.2d, 1040. So that motion is denied.

Trial transcript, Vol. 2, p. 139, follows:

Q. I mean, you got to contribute to charities, don't you?

A. Well, that's right.

Q. And for instance, do you have to sponsor the Deer Basketball Team and what have you?

A. Yeah. I've been in office—I think any office holder can tell you this. It's everyday. I mean, they come and they want to know if you'll sponsor the FHA or anything and that's 10—my wife can vouch for that how much that—it—what it costs us for a charity. And that's the only charity which you get deducted off the income tax but it don't help you much.

Q. Let me ask you this. Did you in October—from—between the time of October 1 or up until November 5, give Cotton Holt any money to buy votes with?

A. No, sir. I might have given him some money to buy some gas but not to buy votes.

Q. To work as a precinct worker?

A. Yes, sir, that's what he was. He was a—and he's just like a thousand or 2,000 people out there working for me.

Trial transcript, Vol. 2, p. 153, follows:

Q. I realize there's a fine distinction, Mr. Campbell, as to a campaign supporter and a campaign worker but how many workers, people that really had some responsibilities on a volunteer basis that you bought drinks and eats for?

A. I think we mentioned earlier three or four, something like that to a township.

Q. And how many townships in the county?

A. We've got 22 or 23, I'm not sure.

Q. 50, 60, 70 people then, is that right, would be campaign workers?

A. Yeah.

Q. Now are those people county employees also?

A. I don't think so, no, I mean I might have some—

Q. Not any of them?

A. There might be a few of them but I don't think none of these people are county employees. I've got some county employees that on the day of the election hauls people in but I don't think none of these people would be considered county employees.

Trial transcript, Vol. 3, pp. 21-22, follows:

THE COURT: [. . .] Let me do one other thing; as I said U.S. v. Bell, which we referred to earlier, the Court of Appeals told us, told us trial judges to make the U.S. v. Bell findings after all the evidence is in. I had made

them again now that I've heard all of the evidence. As I already indicated, the U.S. v. Bell problem, and I don't think it's a problem, the U.S. v. Bell issue comes about, as I recall, because of one piece of testimony, maybe it happened more than once with more than one witness, but there was one piece of testimony in which the Court allowed the witness to testify about statements made to them about who was, who these ballots were being obtained for. I think the evidence was that the individual, I believe it was Mr. Holt, told the witnesses that he was doing this for Alton Campbell and that they would be taken back to Alton Campbell. Those statements technically are hearsay except for the provisions of 801 D (2)(e), I believe it is, of the Federal Rules of Evidence which allow those kinds of statements and exclude them from the hearsay rule. The U.S. v. Bell case, however, tells the trial courts to make a finding on the record about the admissibility of those and the rule or the case specifies what the Court is to look at in determining that. After hearing all the evidence in the case including the evidence of the defendants in the case, the Court believes that the government, if the jury believes the evidence, and there's a great dispute about it, of course, but if the jury believes the evidence more likely than not there was a conspiracy involved in the case and more likely than not, all of the defendants were involved in that conspiracy and more likely than not, the statements were made by that individual during and in furtherance of that conspiracy. The Court believes that that evidence, frankly was a little worried earlier about whether or not Mr. Holt had been connected to the conspiracy sufficiently to allow Count I to go to the jury on Mr. Holt. The Court believes the defendants' evidence has added to the evidence that already existed in that regard and that is Mr. Campbell testified I think rather unequivocally that Mr. Holt was one of his campaign workers; that he was helping him along with many other people, so I think that the evidence is there under U.S.

v. Bell to allow those statements to remain in the record in relation to all defendants. In addition, Mr. Adams, and I think on one or two other occasions, other attorneys objected to certain documents being received because his client was not by the testimony involved in that particular transaction or event. The same thing, I think, applies that I've already discussed in relation to U.S. v. Bell.

No. 88-47

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALTON CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in questioning and excusing a juror based on information that the juror's parents-in-law were personally associated with petitioner through their political affiliation.

2. Whether the out-of-court declarations of a co-conspirator were properly admitted at trial under Fed. R. Evid. 801(d)(2)(E).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 845 F.2d 782.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1988. A petition for rehearing was denied on June 13, 1988. The petition for a writ of certiorari was filed on July 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Arkansas, petitioner was convicted on two counts of purchasing votes, in violation of 42 U.S.C. 1973i(c). Petitioner and two co-defendants were acquitted on one count of conspiracy to purchase votes, in violation of 18 U.S.C. 371, and one count of multiple voting, in violation of 42 U.S.C. 1973i(e). Petitioner was also acquitted on 12 counts of purchasing votes. Petitioner was sentenced to three years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. 1a-11a).

1. Petitioner, a county judge in Newton County, Arkansas, was a candidate for re-election at a general election to be held on November 4, 1986. His co-defendant, Charles Clark, was a candidate for sheriff in the same election, and his other co-defendant, Dennis Holt, was a precinct worker and political supporter of petitioner and Clark. Shortly before the election, petitioner and Clark approached a number of individuals and offered to purchase their votes. With respect to the two counts on which he was convicted, the evidence showed that petitioner personally paid $50 to one county resident, Pamela Cross, in exchange for her blank absentee ballot and that he paid $30 to another resident, Penny Ann Carter, in exchange for her absentee vote. Pet. App. 2a, 8a.

At trial, two other voters, Jack Bough and Wanda Bough, testified that Holt paid each of them $40 to sign absentee voter applications and statements that were needed to obtain absentee ballots (Pet. App. 20a-26a). They also testified that Holt said that he would give the absentee voter statements and ballots to petitioner and that petitioner would finish filling

them out (*id.* at 20a, 24a). Petitioner objected to their testimony on the ground that Holt's statements were not admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), because there was no independent evidence of a conspiracy between himself and Holt (Pet. App. 20a, 25a). Relying on *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978), the district court conditionally admitted the testimony (Pet. App. 21a, 26a). At the close of the government's case, the district court found that the government had proved by a preponderance of the evidence that a vote-buying conspiracy existed, that petitioner and Holt were members of the conspiracy, and that Holt's statements to the Boughs were made during the course and in furtherance of the conspiracy (*id.* at 26a-28a, 29a-31a). The district court accordingly ruled that Holt's statements were admissible under Rule 801(d)(2)(E). The court reaffirmed that ruling at the close of all the evidence (Pet. App. 26a-28a, 29a-31a).

After the second day of trial, an FBI agent received a telephone call from a citizen of Newton County. The caller told the agent that one of the jurors, Robin Noell, was the son-in-law of two citizens of Newton County who were close to petitioner and had worked for him during the election. The caller also advised the agent that Noell had received a culvert, which he had put to personal use, from petitioner through his father-in-law. In addition, according to the FBI agent's records, one of Noell's parents-in-law had picked up an absentee ballot for the election, and the other had picked up more than one ballot and perhaps as many as five. That evening, the FBI agent notified the prosecutor about the call. Pet. App. 2a, 15a.

The next morning, the prosecutor informed the district court about the telephone call received by the FBI agent. The court gave its charge to the jury and the two alternates, but instructed them not to begin deliberations until after the alternates had been excused. The judge then had juror Noell brought to his chambers, where he questioned Noell outside the presence of counsel. Upon completing the questioning, the court excused Noell and one of the alternates and directed the jury to begin deliberations. Pet. App. 2a-3a.

After the jury retired to begin its deliberations, the district judge made a record in open court concerning the removal of Noell from the jury (Pet. App. 14a-19a). In response to the district judge's questions, Noell confirmed that his parents-in-law knew petitioner, but he stated that he did not know whether they had worked for petitioner (*id.* at 15a). Based on his past experience in Newton County, the district judge observed that "they feel very strongly about their politics down there and they also—it's a very small county, very rural county. The Republicans are usually very close to other Republicans, the Democrats are usually very close to other Democrats" (*id.* at 16a). Because the district concluded that that information provided sufficient grounds to excuse Noell, it did not question him about the allegation that he had received a culvert from petitioner through his father-in-law (*id.* at 15a-16a). The court further explained that his questions "tainted that juror and I don't think I have any choice but to go ahead at that point and excuse him" (*id.* at 18a). Petitioner's counsel renewed his objection to the court's decision to question Noell in the first place, but noted "for the record that I agree with the Court that once he spoke

to the jury [*sic*] he had no choice but to strike him" (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1a-11a). The court held that the district court did not abuse its discretion under Fed. R. Crim. P. 24(c) by questioning juror Noell because "[t]he information provided by [the prosecutor], based upon [the FBI agent's] report and the records, raised a serious question about Noell's impartiality" (Pet. App. 4a-5a). The court of appeals also held that the district court did not abuse its discretion in excusing Noell. The court explained that "Noell confirmed that he was aware his parents-in-law knew [petitioner], and the records mentioned by [the FBI agent and the prosecutor] indicated that Noell's in-laws had worked for [petitioner] during the election" (*id.* at 5a). The court also pointed out that "[t]he district judge also knew that partisan feelings in Newton County ran high" (*ibid.*). It was therefore not an abuse of discretion, the court of appeals held, for the district court to excuse Noell based on its concern that "any of these factors might affect Noell's impartiality" (*ibid.*).

The court of appeals also upheld the admission of Holt's statements to Jack and Wanda Bough under Fed. R. Evid. 801(d)(2)(E) (Pet. App. 10a-11a). Relying on *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), the court noted that the district court had made the required preliminary findings in order to admit Holt's statements under the rule (Pet. App. 10a-11a). The court rejected petitioner's claim that the district court had improperly based its findings of a conspiracy involving both petitioner and Holt solely on Holt's hearsay statements (*ibid.*). The court found that "[n]on-hearsay testimony and documentary evidence was offered to show that [peti-

tioner] and Holt, acting individually, bought absentee voting materials from various persons, including Pamela Cross, Penny Ann Carter, and the Boughs, and that Holt was a precinct worker for [petitioner]" (*id.* at 11a). The court also observed that there was other evidence showing that "[petitioner] and Charles Clark, acting together, negotiated with [two other voters] to purchase their absentee votes and [three] of their relatives * * * for $50.00 each" and that "[petitioner] later paid [one of those voters] $250.00 for the five blank absentee ballots" (*ibid.*). The court concluded that that non-hearsay evidence, "[t]ogether with Holt's statements that he would take the voting materials he had purchased from the Boughs to [petitioner] for completion," was sufficient to support the district court's preliminary finding that petitioner and Holt were members of a vote-buying conspiracy (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the district court improperly excused juror Noell solely on the basis of the political affiliation of his parents-in-law. The district court, however, did not excuse juror Noell solely because his parents-in-law were Republicans. Rather, the court based its ruling on the special circumstances of the case: that Noell's in-laws were of the same political party as petitioner and from the same county; that Newton County is a very small county (having a population of less than 8,000); that partisan political feelings run very strong in Newton County; that Republicans in that county are "usually very close to other Republicans"; and that Noell knew that his in-laws knew petitioner. Pet. App. 15a-16a. As the court of appeals explained (*id.* at 6a), the district court's experience with the

strength of partisan feelings in Newton County merely reinforced its concern "that residents of this small rural county and others closely associated with them might be predisposed in their views of the case." Hence, the district court's decision to excuse Noell for possible bias was properly bottomed on his in-laws' association with petitioner, and not merely on their political affiliation with the Republican party.

Petitioner claims (Pet. 10-13) that the decision of the court of appeals conflicts with *United States* v. *Salamone*, 800 F.2d 1216 (3d Cir. 1986). In fact, there is no conflict between the two decisions. In *Salamone*, the Third Circuit held, in a firearms possession case, that it was improper for the district court to excuse for cause six potential jurors solely because they or members of their family belonged to the National Rifle Association. A finding of bias, the court held, could not properly be based on such group affiliation alone. *Id.* at 1225-1227. The finding of juror bias in this case, however, was not based on group affiliation, but on personal association. For the same reason, there is no merit to petitioner's related claim (Pet. 13-14) that the court of appeals' decision is inconsistent with decisions of this Court holding that "a juror may not be excluded solely on the basis of group affiliations" (*id.* at 13). Thus, a juror may not be excluded simply because he is a member of the Rotary Club or the Chamber of Commerce. But if the Rotary Club or the Chamber of Commerce in a particular community had only ten members and the defendant was one of them, it would be entirely proper for the court to exclude as a juror any other member of those organizations. The exclusion in that case, as in this one, would be based not on group affiliation but on personal association.

In any event, because petitioner objected only to the district court's decision to question Noell (Pet. App. 17a-18a), petitioner has waived any claim that the district court excused Noell for improper reasons. Petitioner specifically agreed that the district court "had no choice but to strike [Noell]" once it "tainted" him by questioning him in chambers (*id.* at 18a). Nor has petitioner ever questioned the impartiality of the jury that found him guilty. Thus, petitioner's only possible claim is that the district court was not justified in questioning Noell in the first instance to determine whether he should be excused. As the court of appeals concluded (*id.* at 4a-5a), however, the district court was plainly justified in questioning Noell because "[t]he information provided by [the prosecutor], based upon [the FBI agent's] report and the records, raised a serious question about Noell's impartiality." [1]

2. There is likewise no merit to petitioner's contention (Pet. 14-19) that the court of appeals incorrectly resolved the issue left open in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op.

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[1] Contrary to petitioner's suggestion (Pet. 8), the court of appeals did not fault the district court for questioning Noell in chambers without counsel present and without a record being made. Although petitioners objected to the district court's ruling that it was necessary to question Noell, petitioner did not request an evidentiary hearing and agreed that the district court could pursue its questioning in chambers (Pet. App. 5a-6a n.3, 17a-18a). For that reason, the court of appeals concluded that the district court did not abuse its discretion in proceeding as it did (*id.* at 5a-6a n.3). The court noted, however, that in the future it would be a "more desirable practice" for district courts to question jurors on the record with counsel present (*ibid.*). Cf. *Smith* v. *Phillips*, 455 U.S. 209, 215-219 (1982).

9, whether the determination that a conspiracy exists for purposes of admitting a co-conspirator's statements under Fed. R. Evid. 801(d)(2)(E) may be based solely on the co-conspirator's hearsay statements. The court of appeals expressly stated (Pet. App. 11a) that "it is not necessary for us to resolve the matter" because the district court here relied on other non-hearsay and documentary evidence in determining that there was sufficient proof of a vote-buying conspiracy to allow admission of Holt's hearsay statements to the Boughs under Rule 801(d)(2)(E).

Nor is there any merit to petitioner's related assertion (Pet. 15-16) that the court of appeals' ruling nonetheless constitutes "a *de facto* holding that a co-conspirator's statements alone can establish a conspiracy."[2] As described by the court of appeals (Pet. App. 11a), the evidence at trial showed that petitioner and his co-defendant Clark, who were both candidates in the election, were acting together to purchase absentee ballots and votes. The evidence also showed that Holt, one of petitioner's precinct workers, engaged in the same scheme and purchased absentee ballots from the Boughs, even though he was

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[2] Petitioner mistakenly asserts (Pet. 19 n.6) that the Eighth Circuit in *United States* v. *Cerone*, 830 F.2d 938 (1987), cert. denied, No. 87-1419 (May 16, 1988), indicated support for the admissibility of hearsay testimony regardless of the lack of independent proof of a conspiracy. The Eighth Circuit in *Cerone*, simply ruled, consistent with *Bourjaily*, that a trial court "may consider any relevant evidence in this determination, including the hearsay statements sought to be admitted" (830 F.2d at 948). The court also "observe[d] that the Government produced direct evidence of the conspiracy and appellants' participation in it" (*id.* at 948 n.10).

not a candidate for any office in the election (see *ibid.*). Both courts below concluded that that evidence, combined with co-defendant Holt's statements to the Boughs that he would be taking their absentee ballots to petitioner, was sufficient to show that Holt was a member of the conspiracy. No further review of petitioner's factbound contention to the contrary is warranted.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOSEPH C. WYDERKO
Attorney

OCTOBER 1988

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[3] Any error in admitting Holt's statements under Rule 801(d)(2)(E) would be harmless in any event, because petitioner was acquitted on the conspiracy count, as well as the substantive counts charging him with buying the votes that were the subject of those statements.

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